No. 85-1439

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FRANKLIN AND MARSHALL COLLEGE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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The American Association of University Professors files this brief *amicus curiae* in support of the Petition for Writ of Certiorari with the consent of both parties.

INTEREST OF THE AMICUS

The American Association of University Professors (hereinafter "AAUP" or the "Association") is a national membership organization of 50,000 faculty members and research scholars in all the academic disciplines. Founded

in 1915, it is the nation's oldest and largest body dedicated to the advancement of higher education from the perspective of faculty concerns.

One of AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for the academic community. AAUP policy statements address the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, the elimination of discrimination, and many other facets of academic life.[1] State and federal courts throughout the country, including this Court, have frequently referred to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their students.[2] The Association participates in litigation as *amicus curiae* on a selective basis and makes here a rare appearance concerning a petition for writ of certiorari.

AAUP has long been concerned with the integrity of procedures for the award of tenure and the renewal of probationary faculty appointments. It has promulgated policy statements on these matters which serve as models for the academic community.[3] An essential ingredient in

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[1] The major AAUP policy statements are compiled in AAUP POLICY DOCUMENTS AND REPORTS (1984), a copy of which is in the collection of the Supreme Court library. The AAUP statements referred to herein may be found in this volume unless otherwise referenced.

[2] *E.g., Delaware State College v. Ricks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982).

[3] The seminal 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by AAUP and the Association of American Colleges, is the "most widely-accepted academic definition of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). Over one hundred educational organizations and

procedures concerning faculty appointments and tenure is the exercise of judgment by senior faculty colleagues. The academic community takes as a fundamental premise that colleagues and fellow specialists are best able to assess the scholarly contributions and potential of individual faculty members. The 1966 *Joint Statement on Government of Colleges and Universities*, formulated by AAUP, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, states that the faculty has the primary role in making decisions about the status of faculty appointments. This "peer review" process places in the hands of faculty members the basic responsibility for determination in matters of appointment, reappointment, and the award of tenure. Full candor and cooperation are essential to the process, and faculty members rely on the strong tradition of confidentiality protecting this exchange of professional opinion.[4]

Coupled with the Association's concern about procedures for faculty evaluation is its historic commitment to the elimination of discrimination based on national origin, race, sex, and other factors not directly relevant to professional performance. AAUP's 1976 *Statement on Discrimination* condemns such bias in the academic community.

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learned societies have endorsed the 1940 *Statement*. In 1971 the Association adopted the derivative *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* setting forth procedures to safeguard against decisions adversely affecting a faculty member that would be violative of academic freedom, impermissibly discriminatory, or based on inadequate consideration. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1971).

[4] *See* "Report of the Committee on Confidentiality in Matters of Faculty Appointments," U. CHI. REC. 165 (May 22, 1979); "Confidentiality of College and University Faculty Personnel Files; Its Appropriate Role in Institutional Affairs," American Council on Education (1981).

The official interests of AAUP thus extend both to the unsuccessful candidate for tenure or renewal of appointment who reasonably alleges that the decision-making process was tainted by discrimination and also to the faculty members charged with primary responsibility for evaluation of the candidate. Cases such as the instant one bring into conflict the values of eliminating discrimination in the peer review process, on the one hand, and protecting the candid expression of opinion by faculty peers, on the other. As fully described in the argument section below, in 1980 the Association examined these respective interests and reached an accommodation of them in its *Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, reprinted as Appendix A. By virtue of its appreciation of the central conflicting considerations here, which have been thoroughly analyzed within the Association, AAUP is uniquely qualified to address the Court as *amicus curiae*.

REASONS FOR GRANTING THE WRIT

Introduction and Summary of Argument

This case juxtaposes competing interests of the vindication of civil rights and the institutional autonomy required by colleges and universities to discharge their missions of exploring and disseminating knowledge. The recurring question of whether an institution must divulge information related to a tenure decision in response to an unsuccessful candidate's civil rights claim has provoked an acknowledged conflict in the circuits. The resulting disarray in the state of the law has left the academic community unsure of its individual and collective rights and responsibilities.

Amicus AAUP takes no position at present on whether, given the facts of the case, Franklin and Marshall College should be compelled to comply with the EEOC's subpoena. We challenge rather the legal standard adopted

by the court of appeals, which pays little beyond lip service to the legitimate needs of institutions of higher learning in arriving at sound academic decisions. We argue below that the decision exacerbates an existing conflict in the circuits. The federal question is one of great significance to the American professoriate and the larger society, bearing on standards of excellence in institutions of higher learning and on fair individual treatment. Absent review by this Court, the issue will continue to vex the academic community and the lower courts as vigorous civil rights enforcement efforts continue. The resulting uncertainty over the boundaries of confidentiality in the peer review process will impede the candid exchange of views, to the detriment of the process.

We argue further that, even apart from the conflict in the circuits, the decision below is flawed on both practical and legal grounds. From the standpoint of sound academic policy, it articulates a rule excessively undermining the legitimate, although not absolute, confidentiality protecting faculty evaluation processes. From the standpoint of legal precedent, it deviates from decisions of this Court emphasizing the need to weigh governmental intrusions in academic affairs against values of academic freedom and institutional autonomy under the First Amendment. Amicus AAUP urges the Court to grant review, to fashion a constitutionally sufficient standard for application by the lower courts throughout the country.

ARGUMENT

A. The Conflict in the Circuits. As the Third Circuit recognized, its decision cannot be reconciled with the different approaches of the Second and Seventh Circuits to requests for disclosure of peer review materials. While the Third Court simply ruled that the EEOC's wide-ranging subpoena should be enforced *in toto* because of the broad powers which Congress conferred on the Commission, the Second and Seventh Circuits have, in con-

trast, accorded some degree of protection to faculty members exercising candid judgment in the peer review process. In *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), in which AAUP participated as *amicus curiae*, the Second Circuit adopted a balancing test weighing the need for disclosure against the institution's interest in confidentiality. The Seventh Circuit took a slightly different tack, erecting a "qualified academic freedom privilege" protecting the peer review process, which may be overcome by a substantial showing of "particularized need" for the information. *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337, 338 (7th Cir. 1983).

The Third Circuit, in contrast, is now aligned with the Eleventh Circuit, which was the first court of appeals to address the issue. In *In Re Dinnan*, 661 F.2d 426 (11th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), the court ordered disclosure of information without regard to the need for confidentiality in the peer review process. Thus, as aptly pointed out by Franklin and Marshall College in its petition for writ of certiorari, we now have three different standards employed by four courts of appeals for deciding whether tenure review materials must be divulged in connection with a civil rights claim by an unsuccessful candidate.[5] Petition, p. 8.

Given the nature of the issue, it would appear to be simply a matter of time before the remaining circuits join in the debate. One district court in Arkansas has already followed the Third Circuit, perhaps positioning the Eighth Circuit to be the next to rule. *Rollins v. Farris*, 39 Fair Empl. Prac. Cas. 1102 (E.D. Ark 1985). At the administrative level, the EEOC will continue to seek confidential peer review information as it investi-

[5] The proliferation of law review commentary on the compelled disclosure of faculty peer review materials further underscores the unsettled state of the law. A selected listing of articles appears as Appendix B.

gates faculty members' complaints of employment discrimination. Between October 1, 1984 and September 30, 1985, EEOC received 1823 charges of discrimination against colleges and universities, some unspecified portion of which were filed by faculty members challenging decisions made by their peers.[6] EEOC Chairman Clarence Thomas announced in December 1985 that the Commission planned "more aggressive and more hard-nosed" enforcement for the coming year, particularly against employers who fail to comply with subpoenas issued during the course of an EEOC investigation.[7] One-fourth of the 400 cases filed by EEOC last year were subpoena enforcement actions, up from less than 10 percent of the cases filed in 1980.[8] These factors, coupled with the private civil rights litigation pursued by individual faculty members, strongly suggest that the issue will recur.

Because of the conflict in the circuits, the federal rights of professors now hinge on the vagaries of geography. Yet scholarship and academic interests are not circumscribed by state boundaries.[9] A faculty member may respond to an inquiry from a peer review committee at an institution anywhere in the country which is evaluating a fellow scholar. In the current circumstances, the degree of confidentiality accorded by federal

[6] In the first three months of the current fiscal year, from October 1 to December 31, 1985, the Commission received 466 charges against institutions of higher education. These figures were recently obtained from EEOC's office of Information Systems Services in Washington.

[7] "EEOC's Tough Stand to Continue in 1986, Warning Goes to Employers Who Refuse to Turn Over Documents," 120 LAB. REL. REP. 293-94 (BNA 12/9/85).

[8] *Id.*

[9] *See Burt v. Board of Regents of Univ. of Neb.*, 757 F.2d 242 (10th Cir. 1985), *vacated as moot sub nom. Connolly v. Burt*, 54 U.S.L.W. 3598 (S. Ct. 3/11/86) (whether *in personam* jurisdiction may be based on letter of reference mailed by faculty member to distant state).

law to such a reference depends on where the committee is located. National academic organizations such as AAUP also regularly confront the conflict in the circuits as they respond to requests for advice and assistance from faculty members and administrators about the legal standards governing the compelled disclosure of peer deliberations.

The question of the appropriate legal standard for disclosure of faculty peer review deliberations in connection with a civil rights claim has, as observed by both the majority and dissent in the Third Circuit, divided the courts of appeals. The issue, which will inevitably recur, has a broad impact on the academic community and merits resolution by this Court.

B. Flaws in the Third Circuit Decision. Even apart from the conflict in the circuits, the flaws inherent in the decision of the court below require review. We address the deficiencies of the rule devised by the Third Circuit when measured against sound academic practice. We then turn to the defects of the rule in light of First Amendment precedents of this Court, and conclude with some observations about the place of confidentiality in the peer review process, a consideration largely ignored by the court below.

In the wake of the imprisonment of Professor James Dinnan of the University of Georgia for his refusal to comply with a judicial order to divulge his vote on a tenure candidate, AAUP examined the competing considerations presented by the situation. The Association had earlier been contacted by Professor Maija Blaubergs, the unsuccessful tenure candidate whose allegations of discrimination later occasioned Dinnan's defiance. Committees within AAUP, not apprised of full details of the controversy, addressed the respective rights of tenure candidates and peer evaluators without passing judgment on the Georgia situation. The Association's

resulting policy position, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, was adopted unanimously by the AAUP's governing Council in 1980 as Association policy. 67 *Academe: Bull. of AAUP* 27 (Feb./Mar. 1981). While the *Preliminary Statement* was AAUP's immediate response to a new and difficult issue, we view the policy as having withstood the test of time. It appears as Appendix A.

The *Preliminary Statement* advocates a balancing approach, stating in essence that in order to defeat the qualified privilege protecting the peer review process, a disappointed candidate must raise a "sufficient inference that some impermissible consideration was likely to have played a role" in the adverse decision. Such a preliminary showing would prevail over the presumption of the integrity of the academic process. AAUP adopted the statement as the optimal accommodation of the interests of all parties, best serving the academic community as a whole. In developing its policy, the Association sought to balance the need for confidentiality in the peer review process against the need for disclosure to vindicate civil rights. The resulting standard does not permit a hollow allegation of discrimination to intrude into the sensitive deliberations of a peer review committee, but rather first requires a showing of possible merit to the individual's discrimination claim. AAUP submits that through this approach the competing values are appropriately reconciled.

The Second Circuit, expressly endorsed AAUP's position:

> We believe the position of the AAUP on the precise matter before us to be carefully designed to protect confidentiality and encourage a candid peer review process. It strikes an appropriate balance between academic freedom and educational excel-

> lence on the one hand and individual rights to fair consideration on the other. . . .

Gray v. Board of Higher Education, supra, 692 F.2d at 907. The Third Circuit's decision is plainly at odds with the balanced position adopted by AAUP on the basis of its experience in developing standards reflective of sound academic practice.

While the Third Circuit alluded to First Amendment interests present in this case, it proceeded to give virtually no attention to those interests in its construction of Title VII. In doing so the court ignored its obligation to interpret statutes so as to avoid constitutional questions and also disregarded the teachings of this Court on balancing governmental and academic interests.

Academic freedom is a "special concern of the First Amendment." *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967); *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (Powell, J). At issue in this case is not the teaching or publication activity of an individual scholar, but rather the collective interests of the faculty and institution in effective faculty evaluations.[10] Justice Frankfurter listed first among the "four essential freedoms" of the university the freedom "to determine for itself on academic grounds who may teach." *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). *Regents of the University of California v. Bakke,* 438 U.S. 265, 312 (1978) (Powell, J.). Interference with the university's autonomy in deciding who may serve on its faculty, even absent an impact on individual teaching or research, strongly implicates academic freedom. As explained in AAUP's *Preliminary Statement on Judicially Compelled Disclosure,*

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[10] *See* M. Finkin, "On Institutional Academic Freedom," 61 TEX. L. REV. 817, 843 (1983); W. Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," in THE CONCEPT OF ACADEMIC FREEDOM (E. Pincoffs ed. 1975).

> [I]ndividuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance.

Appendix A. This case thus raises significant constitutional issues regarding the degree to which the government may intrude into academic decisions that are central to the proper functioning of a college or university.

The Third Circuit expressly refused to balance these interests, deviating from precedents of this Court favoring such an analysis. When competing values have clashed with the legitimate needs of academic institutions, the Court has employed a balancing approach. In *Sweezy v. New Hampshire,* 354 U.S. 234 (1957), the Court reversed the criminal conviction of a professor who refused to answer to the state attorney general about his political beliefs and classroom lectures. Justice Frankfurter's pivotal concurring opinion recognized that government intrusion could be justified under "exigent and obviously compelling" circumstances. *Id.* at 262. In *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), the Court used a balancing approach to invalidate New York's requirement of a loyalty oath for state university faculty members. In *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the Court struck down a state medical school's special admissions program that created separate admissions criteria and set aside separate places for minority applicants. "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted," the Court also emphasized that "constitutional limitations protecting individual rights may not be disregarded." *Id.* at 314. The fact that Title VII confers on the EEOC certain powers to obtain information does not mean that these powers may necessarily be invoked in the face of

competing constitutionally protected interests. *See Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (Ohio statute compelling disclosure of contributors to minor political party violated First Amendment).

Underlying the Court's resolution of this line of cases is the assessment of an appropriate degree of deference to the needs of academic institutions. Here those needs include candor and confidentiality in the peer review process. The Third Circuit's excessively broad standard will, we are convinced, weaken the soundness of the process.[11] Colleagues within the institution, no longer able to rely on appropriate confidentiality, will be increasingly reluctant to offer candid opinions, particularly negative ones. Experts from outside the institution, asked to provide evaluations, may decline to offer their judgments. The reluctance would be grounded not so much, as some have suggested, in a faint-heartedness, as in decency and professional concern for the public standing and reputation of the candidate. This Court has indicated in the context of the Freedom of Information Act, 5 U.S.C. § 552,

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process.

N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). Unfettered disclosure of faculty evaluations will thus serve to reduce the reliability of the evaluations themselves, to the serious detriment of standards of excellence in higher education.

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[11] *See* W. Rehnquist, "Sunshine in the Third Branch," 16 WASHBURN L. J. 559 (1977) (examining hypothetically the adverse impact on the Court's decision-making process were its conferences not confidential).

CONCLUSION

To resolve the tensions created by the severe conflict among the circuits, and to fashion a solution that will avert a confrontation with First Amendment values, the Court should grant the petition for writ of certiorari in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments

The following statement, approved by Committee A and adopted by the Council at their meetings in November, 1980, addresses the issues posed in seeking disclosure of faculty member's positions in a discrimination complaint. These issues have gained national attention in recent months as a result of the imprisonment of Professor James Dinnan of the University of Georgia after he refused to comply with a judicial order to divulge his vote on the tenure candidacy of Professor Maija Blaubergs.

A dramatic episode arising at the University of Georgia presents complex and difficult questions. What follows expresses no judgment about the facts or the merits of that case, as to which we believe the academic community to be insufficiently informed.

We believe that the harsh action of imprisonment, which we deplore, has overshadowed the underlying issues: first, the necessity of proper procedures for rectifying discrimination; second, the proper scope of judicial compulsion in such cases, to which this statement is principally addressed.

Faculty members have the right to decisions on the renewal of their appointments free of impermissible considerations, such as considerations violative of academic freedom or prejudice with respect to race, sex, religion, or national origin. This Association has buttressed this principle by concluding that, in the event of an adverse decision on renewal, the faculty member should be advised of the reasons which contributed to that decision, have an opportunity to request a reconsideration by the decision-making body, and have available a standing hearing committee to entertain any complaint that an

impermissible consideration played a role in the decision. Moreover, in the context of such proceedings the Association has recognized that in appropriate circumstances the participants in the decision-making process may permissibly be called upon to account for their actions.

At the same time, institutions ought to be free from impermissible external intrusions or constraints in making nonrenewal decisions. This freedom is claimed not only as a matter of prudence, resting upon the higher competence of those engaged in the enterprise to select their peers and the chilling effect upon that exercise of judgment engendered by external constraints, but as a matter of principle: individuals within the academy will not be free to exercise their academic freedom if the academy as a whole is not afforded the proper measure of self-governance. Therefore, when litigation involves judicially compelled disclosure of the actions and motivations of the faculty participants in the nonrenewal process, the courts should recognize the value of maintaining institutional integrity.

We believe it inappropriate for a court to compel disclosure of the actions and motivations of the individual participants in a nonrenewal decision without first weighing the facts and circumstances asserted by the complainant. A judgment must then follow that those facts and circumstances raise a sufficient inference that some impermissible consideration was likely to have played a role to overcome the presumption in favor of the integrity of the academic process. That is, the inference must be sufficiently strong to defeat the claim, albeit a qualified one, that faculty members may properly assert to a degree of privilege that shields their actions and thought processes from judicial inquiry. Among the factors that a court may properly weigh in making that determination are the adequacy of the procedures employed in the nonrenewal decision, the adequacy of the reasons offered in defense of the decision, the adequacy of the review

procedures internal to the institution, statistical evidence that might give rise to an inference of discrimination, factual assertions of statements or incidents that indicate personal bias or prejudices on the part of the participants, the availability of the information sought from other sources, and the importance of the information sought to the issues presented.

We reiterate, however, that this statement of general principle does not represent a judgment on whether or not a proper weighing of these factors occurred in the particular case that gave rise to our concern.

APPENDIX B

Citations to Law Review Commentary on the Disclosure of Faculty Peer Review Deliberations

Academic Freedom Privilege: An Excessive Solution to the Problem of Protecting Confidentiality, 51 U. Cin. L. Rev. 326 (1982)

Academic Freedom Privilege in the Peer Review Context: *In Re Dinnan* and *Gray v. Board of Higher Education*, 36 Rutgers L. Rev. 286 (1984)

Academic Freedom vs. Title VII: Will Equal Employment Opportunity Be Denied on Campus, 42 Ohio St. L. J. 989 (1981)

Balancing Academic Freedom and Civil Rights: Toward an Appropriate Privilege for the Votes of Academic Peer Review Committees, 68 Iowa L. Rev. 585 (1983)

Challenge to Antidiscrimination Enforcement on Campus: Consideration of an Academic Freedom Privilege, 57 St. John's L. Rev. 546 (1983)

Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia, 60 N. Car. L. Rev. 438 (1982)

Corngold, E., Title VII and Confidentiality in the University, 12 J. L. & Educ. 587 (1983)

Discovery of Tenure Proceedings: Through the Privilege Barrier, 20 Hous. L. Rev. 1447 (1983)

Due Process in Decisions Relating to Tenure in Higher Education, 39 Rec. A.B. City N.Y. 392 (1984) (authored by the Special Committee on Education and the Law of the Association of the Bar of the City of New York), reprinted in 11 J. Coll. & Univ. L. 323 (1984)

Evidence—A Privilege Based on Academic Freedom Does Not Insulate a University from Disclosing Confidential Employment Information, 52 Miss. L. J. 493 (1982)

Gregory, J., Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom, 16 U. Cal. Davis L. Rev. 1023 (1983)

Hill, J., Hill, E., Employment Discrimination: A Rollback of Confidentiality in University Tenure Procedures?, 22 Am. Bus. L. J. 209 (1984)

Kaplan, D., Cogan, B., Case Against Recognition of a General Academic Privilege, 60 U. Det. J. Urb. L. 205 (1983)

Lee, B., Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation, 9 J. Coll. & Univ. L. 279 (1983)

Liethen, M., Academic Freedom and Civil Discovery, 10 J. Coll. & Univ. L. 113 (1984)

Mobilia, M., The Academic Freedom Privilege: A Sword or a Shield?, 9 Vt. L. Rev. 43 (1984)

Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 Calif. L. Rev. 1538 (1981)

Tepker, H., Jr., Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference, 16 U. Cal. Davis L. Rev. 1047 (1983)

The importance of the issue before the Court in this case is reflected by the fact that the amici curiae include not only state institutions but also private institutions, including secular institutions like Carnegie-Mellon University, Point Park College, the Medical College of Pennsylvania and the University of Medicine and Dentistry of New Jersey, as well as religiously-affiliated institutions.

The amici here represented reflect a wide variety of religious concerns. A number of those not already mentioned are Roman Catholic: Duquesne University of the Holy Ghost, Saint Vincent's College, Carlow College, the University of Scranton, Seton Hill College, Seton Hall University, and the Allentown College of St. Francis de Sales.

Others reflect Protestant denominations: Texas Christian University (Disciples of Christ); Thiel College and Susquehanna University (Lutheran); and the Pittsburgh Theological Seminary of the Presbyterian Church (USA) (Presbyterian). These institutions, down to the smallest amici, Lancaster Bible College with only 350 students, ordinarily have a special concern for the First Amendment because they are religiously affiliated. Their participation reflects a heightened concern that the Third Circuit's decision, which fails to give weight to one type of First Amendment freedom, also suggests that a balancing test will not be followed where other First Amendment freedoms are involved in EEOC investigations.

The concern of these amici is a very realistic and immediate one. One amicus, Saint Francis College, already has had the Third Circuit's ruling applied to it. *Allan v. St. Francis College,* F.2d (3d Cir. Docket No. 85-3205; March 3, 1986) (Slip Op. at 26 n.16).[2]

A complete listing of the institutions participating as amici curiae is set forth at the end of this brief.

REASONS FOR GRANTING THE PETITION

The 66 amici curiae appearing by this brief join with petitioner in urging this Court to review the Third Circuit's decision because it is in direct conflict with decisions from this Court and two other courts of appeals, because the Third Circuit's loose relevance standard fails to give proper consideration to the First Amendment concerns present here and to the tenure review process in particular, and because the decision represents a major departure from related precedent in the Fourth, Fifth, and Ninth Circuits.

This is a very important issue. The guarantee that evaluations and comments received about a faculty member will remain confidential is an essential element of the tenure review process. Moreover, preserving that confidentiality has been a right and responsibility of institutions of higher education since the rise of the university in medieval times.

In the year 1231, Pope Gregory IX issued a Papal Bull to the Masters at the University of Paris that acknowledged and protected a number of rights, in order to resolve a cessation of teaching at the University of Paris which had gone on for several years. Among the rights protected was

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[2]The decision also has been applied outside of the Third Circuit. *Paul v. Stanford University,* F.Supp. , 39 CCH EPD ¶35,918 at 41,370 (N.D. Cal. 1986); *Rollins v. Ferris,* F.Supp. , 39 BNA FEP Cases 1102, 1104-05 (E.D. Ark. 1985) (applying decision at the University of Central Arkansas).

the confidentiality of the advice of those Masters as to the candidacy of others to become professors.

> Therefore, concerning the condition of the students and schools, we have decided that the following should be observed: each chancellor, appointed hereafter at Paris, at the time of his installation . . . shall swear that, in good faith, according to his conscience, he will not receive as professors of theology and canon law any but suitable men, at a suitable place and time, according to the condition of the city and the honor and glory of those branches of learning; and he will reject all who are unworthy without respect to persons or nations. Before licensing any one, during three months, dating from the time when the license is required, the chancellor shall make diligent inquiries of all the masters of theology present in the city, and of all other honest and learned men through whom the truth can be ascertained, concerning the life knowledge, capacity, purpose and other qualities needful in such persons; and after the inquiries, in good faith and according to his conscience, as shall seem fitting and expedient. The masters of theology and canon law, when they begin to lecture, shall take a public oath that they will give true testimony on the above points. *The chancellor shall also swear, that he will in no way reveal the advice of the masters, to their injury; the liberty and privileges being maintained in their full vigor for the canons at Paris, as they were in the beginning.* Moreover, the chancellor shall promise to examine in good faith the masters in medicine and arts and in the other branches, to admit only the worthy and to reject the unworthy.[3]

[3]*Translations & Reprints from the Original Sources of European History*, No. 3 at 8 (D. Munro, ed., University of Pennsylvania Dept. of History) (P. S. King & Son, publ.) (London 1897). (Emphasis added.)

(Continued on next page)

The Third Circuit acknowledged that, today, such confidentiality plays an "important role" in the peer group review process which is "central" to the determination of "who may teach"—one of the essential academic freedoms protected by the First Amendment. (Petition at 8a.) Nevertheless, the Third Cirucit refused to follow a balancing of interests approach which would evaluate the potential infringement of First Amendment freedoms on a case by case basis. (Petition at 8a.) Thus, the Third Circuit decision not only fails to respect this historic and essential freedom but it also placed that circuit in direct conflict with decisions of this Court and other courts of appeals.

The Third Circuit also erred by failing to recognize the significance of the fact that this was an *individual* Title VII charge—not a charge that there has been a "pattern and practice" of discrimination throughout the institution. This error led the Third Circuit to require institution-wide disclosure of peer review tenure materials in a case involving only one instructor. This is a marked departure from prior precedent. This error also led the Third Circuit to fail to consider that Title VII's relevance standard properly is more narrow in an individual case than in an institution-wide or "pattern or practice" case.

Thus, although even the Third Circuit recognized that its decision created a conflict with two other courts of appeals on at least the First Amendment issue, the practical impact of the decision—when its "relevance" aspects also are considered—creates a conflict which is even broader and more dramatic.

(Continued)

The University of Paris was the great model for other French, English, German, Spanish, and Portugese universities. *Id.* at 1.

These errors led to a decision which is of critical importance to our nation's colleges and universities because it will drastically deter the candid commentary from participants which is essential to peer-group faculty reviews. The Third Circuit's decision, if not reviewed by this Court, will have a highly detrimental impact upon the ability of academic institutions to obtain the information and analysis essential to the faculty promotion and tenure decision-making process. Indeed, even the Third Circuit panel majority recognized that its decision will be the "demise" of the confidentiality in the peer-group review process which has been revered since at least medieval times. (Petition at 10a).

I. The Third Circuit Decided An Important First Amendment Issue In A Manner That Was Not Correct And Which Conflicts With Decisions Of This Court And Other Courts Of Appeal.

The Third Circuit acknowledges that First Amendment freedoms were infringed upon by its decision. (Petition at 8a.) The Third Circuit also acknowledged that confidentiality in the peer review system played an "important role" in the exercise of that academic freedom. (Petition at 8a.)

Nevertheless, the Third Circuit ignored the clear precedent of Constitutional decisions of this Court that require both a balancing of the interests involved on a case by case basis and a narrow tailoring of the scope of any intrusion permitted upon the First Amendment freedom at issue.

This Court has held that academic freedom, like political expression, is an area in which the government "should be *extremely reticent* to tread." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Where a governmental intrusion into protected First Amendment values may occur, this Court has required that the means pursued be narrowly drawn so not as to "stifle fundamental personal liberties." *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In situations such as this, the danger of a "chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools . . . " *Keyishian, supra*, 385 U.S. at 604.

At a minimum, a "balancing of interests" on a case-by-case basis is required. *See, e.g., Sweezy, supra*, 354 U.S. at 250-55; 354 U.S. at 265-67 (Frankfurter, J., concurring); *Konigsberg v. State Bar*, 366 U.S. 36, 51 (1961); *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

Directly contrary to the approaches of the Seventh Circuit[4] and the Second Circuit,[5] both of which recognized an invasion by the government into a First Amendment value and designed safeguards to protect that value, the Third Circuit refused to engage in a balancing of interests test even though it acknowledged that First Amendment freedoms were involved. The Third Circuit declined to follow either the *Notre Dame* or *Gray* decisions. Indeed, the Third Circuit in this case did not engage in any constitutional analysis. This disregard of academic freedom and the confidentiality of the peer review process should not and cannot be permitted. A traditional freedom, essential to colleges and universities throughout this nation, is at stake.

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[4] *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983).

[5] *Gray v. Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982).

The Third Circuit cited the legislative history of Title VII as the basis for its determination that it would not follow a balancing approach or adopt a qualified privilege concerning peer group evaluations, as the Second and Seventh Circuits did, respectively.

This also reflects several fundamental errors of Constitutional interpretation.

First, in a situation in which First Amendment freedoms are involved, Congressional views evidenced in legislative history or even in statutory language cannot remove the Constitutional protections afforded those freedoms, including the requirement of performing a balancing test. *Cf. Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973) ("[N]o Act of Congress can authorize a violation of the Constitution.").

Of course, the legislative history of Title VII might be relevant to the interpretation of the interests and concerns reflected in *that statute*—but not to determining the scope of a Constitutional protection—here, the First Amendment.

Even if the standards for interpretation of a statute were applicable, however, the Third Circuit applied the wrong test. The Third Circuit incorrectly examined Title VII for evidence that Congress *did not* intend to permit the EEOC to intrude into this area of First Amendment protection. (Petition at 10a.) Because intrusion upon a Constitutional freedom was involved, any examination of the legislative history of Title VII—assuming *arguendo* that such an examination were relevant—would have to look for indications that Congress expressly *did* intend to invest the EEOC with the unbridled discretion to ignore academic freedom and to violate the confidentiality of the

peer review process. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507 (1979).

> It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . . Moreover, "In areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties."[6]

For all of these reasons, the amici urge this Court to review the Third Circuit's decision in the instant case. A fundamental part of the collegial system is at stake. The importance of this issue to the amici and other educational institutions cannot be overemphasized.

As Richard Hofstadter and Walter Metzer wrote in *The Development of Academic Freedom In The United States* (Col. Univ. Press, 1955) at 506:

> "No one can follow the history of academic freedom in this country without wondering at the fact that any society, interested in the immediate goals of solidarity and self-preservation, should possess the vision to subsidize free criticism and inquiry, and without feeling that the academic freedom we still possess is one of the remarkable achievements of man. At the same time, one cannot but be appalled at the slender thread by which it hangs . . . ."

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[6] *Lowe v. Securities & Exchange Comm'n,* U.S. , 105 n. 50, 105 S.Ct. 2557, n. 50, 86 L.Ed.2d 130, 148 n. 50 (1985), *quoting, Time, Inc. v. Regan,* 468 U.S. , 82 L.Ed.2d 487, 104 S.Ct. 3262 (1984) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

II. The Third Circuit's Holding That Tenure Materials From Throughout The Institution Must Be Produced In An Individual Case Is A Marked Departure From Prior Precedent Nationwide.

The Third Circuit made a major error in legal analysis by failing to focus upon the fact that the charge before the EEOC was that there had been discrimination against a single individual, not that there had been institution-wide or "pattern or practice" discrimination.

This error led the Third Circuit to order the college to disclose confidential peer review tenure materials from the files of every faculty member who had been considered for tenure over a four year period throughout the institution, even though the only matter before the EEOC investigator was the claim of a single disgruntled instructor that he, and he alone, had been discriminated against. This result put the Third Circuit into a conflict with prior decisions on the disclosure of confidential tenure-related materials which is far broader than the conflict the Third Circuit admitted it created with prior decisions by the Second and Seventh Circuit Courts of Appeals. The result is an undesirable and unnecessary departure from related precedent from the Fourth, Fifth, and Ninth Circuits, as well. Moreover, this same error led it to apply Title VII relevance standards from a pattern and practice case to an individual case. That approach would not have been correct under Title VII—even if no First Amendment freedom were involved.

Prior to the Third Circuit's decision in this case, we are aware of no court that had ordered an American college or university to disclose all of its confidential tenure materials *institution-wide* in connection with an *individual* claim of discrimination. Moreover, even in those situations in which other courts have allowed an individual to have

access to his *own* confidential materials, it has only been after a special showing of need and relevance to balance against the privilege of confidentiality—at least until this case.

This issue first arose in the Ninth Circuit. In *McKillop v. University of California,* 386 F.Supp. 1270 (N.D. Cal. 1975), a case relied upon by a number of courts which addressed the issue subsequently,[7] the plaintiff alleged that she had been denied tenure in violation of Title VII. She sought to compel disclosure of confidential tenure materials relating both to her and to other persons in her department. The court held that, applying either federal[8] or state law, the confidential tenure materials were privileged and, therefore, protected from disclosure. The court emphasized a crucial fact which the Third Circuit overlooked—that the plaintiff's case was one in which she claimed that she had been discriminated against as an individual, so that "the focus of her case must be the actions and state of

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[7] *EEOC v. University of Notre Dame du Lac,* 715 F.2d 331, 337 (7th Cir. 1983); *Gray v. Board of Education,* 692 F.2d 901 (2d Cir. 1982); *Zaustinsky v. University of California,* 96 F.R.D. 622 (N.D. Cal. 1983) (Vacating order requiring disclosure of confidential tenure documents of plaintiff and seven other persons in an individual tenure denial case); *Laborde v. University of California,* 686 F.2d 715, 719 (9th Cir. 1982) Affirming denial of untimely motion to disclose plaintiff's own peer review files); *Lynn v. University of California,* 656 F.2d 1337 (9th Cir. 1981) (Specifically not deciding the privilege or First Amendment issues but allowing disclosure of plaintiff's own complete file only because part of her file materials had been offered into evidence by the University); *Hafermehl v. University of Washington,* 29 Wash.App. 366, 628 P.2d 846 (Ct. App. 1981) (Disclosure of faculty member's tenure materials denied); *King v. University of California,* 138 Cal. App.3d 812, 818-19, 189 Cal. Rptr. 189 (1982) (Disclosure of faculty member's peer review materials denied in defamation action); *Stanford University v. Superior Court,* 119 Cal. App.3d 516, 174 Cal.Rptr. 160 (1981) (Reversing order compelling disclosure of faculty member's peer review materials).

[8] 386 F.Supp. at 1278-79 n.15.

mind of the individuals responsible for that decision." *Id.* at 1277.

The Third Circuit's decision also is a distinct departure from two court of appeals decisions[9] which did allow an individual professor to have disclosed to him confidential tenure information relating to himself in an individual case. Each of those other courts of appeals made it clear that disclosure was required because the information related to the individual whose tenure was denied and because the university had relied on those evaluations in explaining why tenure was denied. The Third Circuit's rule—requiring the disclosure of confidential tenure review materials institution-wide in an individual case—is in distinct conflict with the rationales of both the Second and Fifth Circuits.

The Third Circuit's decision is also in stark conflict with the Fourth Circuit's decision in *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977). The Fourth Circuit held that a Title VII plaintiff was not entitled to disclosure of the confidential evaluation materials from across the institution even though the plaintiff had alleged institution-wide discrimination.

The Third Circuit's ruling that confidential tenure materials must be disclosed institution-wide without any special showing that they are related to an individual tenure denial dispute also conflicts with the Seventh Circuit's approach, as the Third Circuit recognized. By contrast, the Seventh Circuit requires careful consideration of "factors

[9] *Gray v. Board of Education*, 692 F.2d 901 (2d Cir. 1982); *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384 (5th Cir. 1980).

unique to the context of faculty tenure denial" and a showing by the EEOC of a "particularized need" before such confidential materials must be disclosed.[10]

These four court of appeals decisions highlight the conflict created by the Third Circuit's decision. Had the *Franklin & Marshall* case arisen in the Second, Fourth, Fifth or Seventh Circuit, the confidentiality of peer review material would have been respected because Franklin & Marshall did not contend that the individual instructor's denial of tenure should be justified on the basis of the confidential tenure evaluation materials of all other professors throughout the college for a four-year period.[11]

This same error by the Third Circuit—failing to recognize the significance of the fact that the instructor was alleging only that he personally had been discriminated against, not that there were college-wide illegal practices—led it to read the relevance standard out of Title VII.

It did so by applying this Court's decision in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), as if it had established that broad institution-wide discovery is appropriate in every Title VII case. The Third Circuit's reliance upon *Shell Oil* was misplaced, for three reasons.

First, the scope of what evidence might be relevant was not at issue in the *Shell Oil* case. The issue was, instead, whether Shell was relieved of the obligation to

[10] *EEOC v. University of Notre Dame du Lac*, 715 F.2d 331, 338-39 (7th Cir. 1983).

[11] Although the *Franklin & Marshall* reasoning is consistent to some extent with that used by the Eleventh Circuit in *In Re Dinnan*, 661 F.2d 426 (11th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982), the Third Circuit's approach represents a departure from even that decision, which required disclosure of confidential data only as to the individual tenure decision at issue in that case.

furnish any data at all because the EEOC allegedly had not followed Title VII's notice procedures. Moreover, this Court made it clear—not only that no definition of "relevance" issue was before it—but also that the relevance standard should not be read out of the statute.[12]

Second, *Shell Oil* was a case in which a "pattern or practice" of discrimination was alleged to have occurred not as to one person, as in the *Franklin & Marshall* case, but as to all employment practices throughout the facility. The Third Circuit made a clear error in assuming that the same broad relevance standard which might be appropriate in a facility-wide pattern or practice case would apply to an individual's claim that he, and he alone, suffered discrimination in one discrete way, denial of tenure. Moreover, the general remarks by this Court about relevance in the *Shell Oil* facility-wide pattern or practice context must be considered in light of the fact that, unlike this case, no First Amendment freedom was implicated or considered by this Court in *Shell Oil.*

Third, the Third Circuit failed to focus on the unique nature of tenure decisions. Had it done so, it would have recognized that each tenure decision is unique. There is no basis whatever for its conclusion that disclosing confidential peer review evaluations used in the tenure process in the math or political science departments might shed any

[12]"Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."

466 U.S. at 69.

light on an unrelated tenure decision in the french department four years later.[13]

In short, by failing to recognize the significance of the fact that the *Franklin & Marshall* case was one individual instructor's claim that he, and he alone, was discriminated against, the Third Circuit's decision not only misapplies this Court's holding in *Shell Oil* and conflicts with decisions from the Second and Seventh Circuits on the First Amendment/privilege issue but also it represents a major departure from Title VII precedent regarding the scope of disclosure as previously applied in college and university cases in the Fourth, Fifth, and Ninth Circuits.

[13]Not only are tenure decision unrelated to each other but tenure committee members may, quite properly, find the same candidate unworthy of an award of tenure for different reasons. *Banerje v. Board of Trustees, Smith College,* 648 F.2d 61, 64 (1st Cir. 1981).

CONCLUSION

For all of the foregoing reasons and for the additional reasons advanced in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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